

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FILED

DEC 18 2014

CLERK U.S. DISTRICT COURT
WEST. DIST. OF PENNSYLVANIA

SHAWN THOMAS MOORE : HONORABLE DAVID S. CERLONE
Plaintiff, pro-se. : HONORABLE MAUREEN P. KELLY
v. : CIVIL ACTION-LAW
JOSEPH ROSSINO, M.D. : No. 2:14-CV-00870-DSC-MPK
et al. Defendants. : JURY TRIAL DEMANDED

CONSOLIDATED BRIEF IN OPPOSITION
TO DEFENDANTS' MOTIONS TO DISMISS

AND NOW comes the Plaintiff SHAWN THOMAS
MOORE, pro-se, and files his Consolidated Brief
In Opposition to Defendants' Motions to Dismiss
and states the following:

PROCEDURAL BACKGROUND

Plaintiff, SHAWN MOORE, filed this
pro-se action against Defendants alleging
Due Process violations pursuant to 42 U.S.C.
§ 1983.

Defendants removed this action from the
Court of Common Pleas, Lawrence County to
this Honorable Court pursuant to original jurisdiction

FACTUAL BACKGROUND

Plaintiff has Hepatitis C. Hepatitis C is a very serious medical condition. Hepatitis C left untreated without the only "treatment" available, a combination of the medications pegylated interferon and ribavirin, leads to liver damage, cirrhosis, and even death. Plaintiff has had severe pain in his liver for well over two years also.

Despite of the Plaintiff's serious medical needs, Defendant Dr. Susan Rossino has not provided any medication for the Plaintiff's Hepatitis C and pain in his liver. Defendant Dr. Susan Rossino told the Plaintiff he would not receive medication treatment for his Hepatitis C while he remains here at the Lawrence County Jail, each time asking the plaintiff how much longer he would be at the jail, to which plaintiff responded "at least two more years."

The Plaintiff filed grievances at the Lawrence County Jail. (See Exhibits A, B, D, E, F, and G.)

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In PrimeCare Medicals response to my grievance (EXHIBIT "C") they state they follow the National Institute of Health's (NIH) recommendations for the treatment of Hepatitis C. PrimeCare stated as follows:

"Current treatment options for patients with HCV infection should discuss treatment options with a physician who is experienced in treating the disease.

Treatment is recommended in patients at increased risk for cirrhosis unless there are reasons that would make treatment unsafe. According to the National Institutes of Health (NIH) persons at increased risk for cirrhosis would include those with HCV infection and:

- Persistent elevation of ALT (alanine aminotransferase, a liver enzyme in the blood)

2 lab results is not persistent

- High levels of HCV RNA in the blood.

No HCV RNA in your results "

Despite the Defendants assertions, that the Plaintiff simply disagrees with the course of treatment, the fact of the matter is, no treatment at all has been provided.

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There may be more than one way to "treat" a variety of illnesses, but that is not the case with Hepatitis C. You're either receiving "treatment" for Hepatitis C with combination therapy of pegylated interferon with ribavirin or you're receiving no "treatment" at all, to which the plaintiff complains... no treatment at all in the face of an "excessive risk to inmate health or safety" (citation omitted), and "an unnecessary and wanton infliction of pain" (citation omitted).

ARGUMENT

"First we tend to be flexible when applying procedural rules to pro-se litigants, especially when interpreting their pleadings. See e.g. Higgs v. Atty., 65 F.3d 333, 339 (3d Cir. 2011). ("The obligation to liberally construe a pro-se litigant's pleadings is well established.") This means we are willing to apply the relevant legal principle even when the complaint has failed to name it. Dukos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003). And at least on one occasion, we have refused to apply the doctrine of appellate

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wavier when dealing with a pro-se litigant. Tabron v. Grace, 6 F3d. 147, 153 n.2 (3d Cir. 1993) This tradition of leniency descends from the Supreme Court's decades-old decision in Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L. Ed. 2d. 652 (1972). In Haines, the Court instructed judges to hold pro-se complaints "to less stringent standards than formal pleadings drafted by lawyers." Id. at 520, 920 S.Ct. 594; see Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L. Ed. 2d 1081 (2007).

We are especially likely to be flexible when dealing with pro-se litigants imprisoned. Such litigants often lack the resources & 245 and freedom necessary to comply with the technical rules of modern litigation. See Moore v. Florida, 703 F2d. 516, 520 (11th Cir. 1983) ("Pro-se prison inmates, with limited access to legal materials, occupy a position significantly different from that occupied by litigants represented by counsel") Quoting Mala v. [REDACTED] - Crown Bay Marina Inc., 704 F2d. 239.

"Under Federal Rule of Civil Procedure, 8(a)(2), a pleading must contain a "short plain statement of the claim showing that the pleader is & 678 entitled to relief." As the court held in Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167

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L. Ed. 2d. 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than the unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.* at 555, 127 S. Ct. 1955. A pleading that offers "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555, 127 S. Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557, 127 S. Ct. 1955.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim that is plausible on its face." *Id.* at 570, 127 S. Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556, 127 S. Ct. 1955. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Quoting *Ashcroft v. Iqbal*, 556 U.S. 662, at 677, 678, 129 S. Ct. 1937 (2009).

Plaintiffs complaint pleads facts that he has Hepatitis C, since 1996, that this is

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a serious medical condition, to which defendants concede. That his blood liver tests show his condition is symptomatic and he is in need of immediate treatment to prevent further exacerbation and irreparable harm to his liver. That he has had chronic pain in his liver for two years that Defendants also refuse to treat. That Defendants have stated the Plaintiff needs to "discuss treatment options with a Physician who is experienced in treating the disease." That Defendants have lied about the plaintiff having HCV-RNA in his blood. That over two years plaintiff has had (9) liver tests (ALT) that have shown extremely elevated levels, and that by N.I.H. standards, the elevated results are persistent and require treatment.

That the defendants have all acted with deliberate indifference to plaintiff's serious medical needs.

These are not "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Iqbal at 662. Nor are they unadorned "tho-defendant-unlawfully-harmed-me accusations." Twombly at 555. These are hard facts in a verified

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complaint. The court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) (Quoting Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)).

DELIBERATE INDIFFERENCE

The Supreme Court identified the basic standard for a deliberate indifference claim in Estelle v. Gamble, 429 U.S. 97, 105-06, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976): "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate *450 indifference to serious medical needs" For conduct to rise to the level of deliberate indifference, plaintiff must demonstrate "an unnecessary and wanton infliction of pain" which is "repugnant to the conscience of mankind" and "offends evolving standards of decency." *Id.* Plaintiff can satisfy this standard by demonstrating both that (1) plaintiff had a serious medical need, and also that (2) the defendant was aware

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of this need and was deliberately indifferent to it. See Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979); See also Wilson v. Seiter, 501 U.S. 294, 296-98, 302-03, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). (Citing McCabe v. Prison Health Services, 117 F.Supp2d. 443, 449-50).

Defendants admit both that plaintiff has a serious medical need and their awareness of it.

The Supreme Court has held that the level of culpability entailed by the second element, deliberate indifference, falls somewhere between mere negligence (carelessness) and actual malice (intent to cause harm). Farmer, 511 U.S. at 836-37, 114 S.Ct. 1970 (holding that a prison official can be found reckless or deliberately indifferent if "the official knows of and disregards an excessive risk to inmate health or safety..."). McCabe at 450.

Defendants state that "negligent misdiagnosis or an inadvertent failure to provide care does not establish a Constitutional violation." Estelle, at 97, and "Deliberate Indifference is more than inadvertence or a good faith error." Whitley v. Albers, 475 U.S. 312.

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There is no "misdiagnosis" or "inadvertance" or anything done on "good faith" on behalf of the defendants. They are a for profit company full aware of the "treatment" they need appear to give to avoid liability in a \$1983 suit. Trying to claim they have given the plaintiff "treatment" but he simply disagrees with it. Or that the care he has received is in line with the standards of care for his disease are an insult. Clearly they have been negligent, but it also rises to a higher degree of culpability, reckless and wanton!

In evaluating claims of deliberate indifference, courts have distinguished between denial of medical treatment, like that alleged here, and inadequate medical treatment. Mere disagreement as to the proper medical treatment does not support a claim of an Eighth Amendment violation; courts will defer to medical judgments of the propriety of treatment. See Mormouth County, 834 F.2d. at 346; (McCabe at 450)

Although an isolated failure to treat, without more, is ordinarily not actionable, it "may in fact rise to the level of a constitutional violation if the surrounding circumstances suggest a degree of deliberateness, rather

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than inadvertence, in the failure to render meaningful treatment." Gill v. Moorey, 824 F.2d. 192, 196 (2d. Cir. 1987) McCabe at 451.

On the other hand, the denial of medical treatment requested by an inmate states a cause of action under § 1983. The Third Circuit has stated that where prison authorities deny reasonable requests for medical treatment, and such denial exposes the inmate "to undue suffering or the threat of tangible residual injury," deliberate indifference is manifest. Monmouth County, 834 F.2d. at 346, (citing Westlake v. Lucas, 537 F.2d. 857, 860 (6th Cir. 1976)). McCabe, 117 F.Supp.2d 443, at 451.

Hepatitis C is a progressive disease that left untreated can cause permanent liver damage, cirrhosis, and even death.

Furthermore, short of total denial, if necessary treatment is delayed for non-medical reasons, a case of deliberate indifference has been made out. Monmouth County, 834 at 346-47, (citing Ancata v Prison Health Servs., 769 F.2d. 700, 704 (11th Cir. 1985)). McCabe at 451.

The Supreme Court in Helling v. McKinney, 509 U.S. 25, 33, 113 S.Ct. 2475 at 2480 "that prison officials may not be deliberately indifferent to an

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inmates current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year. Id at 33.

Additionally, deliberate indifference has been found where "the prison official persists in a particular course of treatment" in the face of "resultant pain and risk of permanent injury." Rouse v. Plantier, 182 F.3d 195, 197 (3d Cir. 1999). (citing White v. Napoleon, 897 F.3d 103, 109 (3d Cir. 1990).

"There may, for example, be several acceptable ways to treat an illness," White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990).

However, that absolutely is not the case with Hepatitis C. There is Interferon and Ribavirin combination therapy and that's it. So, you either being "treated" for the disease or you not.

Last, plaintiff would like to point to the recent decision of this Honorable Court in Neeley v. Carrillo, 2014 WL 2711160 where some of the facts and one of the Defendants (Primecare Medical) mirror the facts in this case. Both Plaintiffs suffer from Hepatitis C and both were told they would

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not be "treated" while at their respective facilities. The Plaintiff has stated a cause of Deliberate Indifference on behalf of Defendants Susan Rossino, Brian Lufley, and Primecare Medical, it is therefore respectfully requested this Honorable Court deny Defendants Motions to Dismiss and allow Plaintiffs claim to move forward to Discovery and Trial.

VERIFICATION

I, SHAWN MOORE, have read the foregoing MOTION IN OPPOSITION and BRIEF IN SUPPORT thereof and verify that the matters alleged therein are true except as to matters alleged on information and belief, as to those, I believe them to be true. I certify under penalty that the foregoing is true and correct.

Dated:

Respectfully Submitted

SHAWN MOORE

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CERTIFICATE OF SERVICE

I hereby certify on the October 9th, 2014 that the foregoing Consolidated Motion and Brief In Support has been served on the following by depositing the same in the United States Mail, postage prepaid, in New Castle, PA on October 9th 2014.

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Respectfully submitted,
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